IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Date of decision : December 06, 2007

Sardool Singh

....Appellant

versus

Daljiwan Kaur and others

....Respondents

Coram: Hon'ble Mr. Justice Pritam Pal

Present : Mr. Kunal Dawar, Advocate for the appellant
Mr. GS Sandhawalia, Advocate, for the respondent No. 1

Pritam Pal,J. (Oral)

This regular second appeal by Sardool Singh appellant is directed against judgment and decree dated 15.5.2004 whereby the suit for declaration on the basis of registered Will dated 18.4.2000 Ex. P1, filed by Smt. Daljiwan Kaur respondent no. 1 was decreed and she was declared owner in possession to the extent of 1/2 share in the suit land measuring 23 kanals 15 malras situated in the revenue estate of village Mustafabad District Kapurthala. Sardool Singh appellant then challenged the aforesaid judgment and decree before the first appellate court. There also he could not succeed and ultimately the appeal was dismissed vide judgment and

decree dated 21.3.2005. This is how feeling aggrieved, the appellant has come up in this appeal.

Without going into any further details, suffice it to say that Daljiwan Kaur respondent No. 1/plaintiff (hereinafter referred to as the plaintiff) had filed a suit for declaration to the effect that she had served Swaran Singh her father-in-law in his old-age, so he had executed the aforesaid Will of his share in the suit property in her favour. At the same time, it was also averred in the plaint that Sardool Singh appellant-defendant (hereinafter referred to as the defendant) was also given the remaining 1/2 share of the total suit property by way of Will executed by Jagir Singh (brother of Swaran Singh) who had died issue-less. This arrangement of the suit property was made with the consent and consultation of Swaran Singh so that family of his both sons could get equal share in the joint suit land left behind by Swaran Singh and Jagir Singh.

On the other hand the case set up by defendant Sardool Singh is that the Will Ex. P1, in fact, was surrounded by suspicious circumstances and as such the same could not have been acted upon by the courts below. At the same time, it was also the case of the defendant that suit for declaration filed by plaintiff-Daljiwan Kaur was not maintainable.

Ultimately, on the pleadings of the parties, following issues were framed by the learned trial court:-

1. Whether the plaintiff is entitled to declaration as prayed for ? OPP

2. Whether the plaintiff has no right to file the present suit ? OPD
3. Whether the plaintiff has not come to the court with clean hands ? OPD
4. Relief.

After recording the evidence and hearing the learned counsel for the parties, learned trial court came to the conclusion that the registered Will Ex. P1 has been duly proved and as such the same was held to be genuine and valid. Accordingly, finding on above issue no. 1 was returned in favour of the plaintiff, whereas findings on issue nos. 2 and 3, the onus of which was on Sardool Singh defendant, were returned against him and ultimately suit of the plaintiff was decreed, as indicated in the opening para of this judgment. Further as stated above, the findings on the aforesaid issues were also affirmed by the first appellate court.

Now the only noticeable point of argument, raised by learned counsel for the defendant is that, in fact, the suit property was ancestral one in the hands of Swaran Singh deceased and as such he was not competent to bequeath his share by way of Will. In support of this contention, reliance has been placed on **Ram Kanwar vs Raj Kumar**, 2000(3) RCR (Civil) 550.

The last and second point of argument raised by learned counsel for the defendant is that simpliciter suit of declaration, as filed by the plaintiff, without seeking possession, was not maintainable but still the

courts below have erred by passing the impugned judgment and decree. In support of this contention, he also relied upon **Ram Saran and another vs Smt. Ganga Devi**, AIR 1972 SC 2685 and **Sita Ram vs Hari Krishan** 1999(1) RCR (Civil) 602.

On the other hand, learned counsel for plaintiff Daljiwan Kaur has repelled the aforesaid points of arguments raised on behalf of the defendant.

I have given my thoughtful consideration to the above contentions and find that both the points now raised in this appeal are devoid of any merit, inasmuch as at the first place, it has no where been the case of the defendant that the suit property was ancestral or coparcenary one in the hands of Swaran Singh deceased. In fact, in order to prove this kind of property, it was incumbent upon the defendant to lay foundation as to how the property was ancestral or coparcenary, but there was no such pleading or any issue before the learned trial court as well as before the first appellate court. It is well settled that no amount of evidence can be gone into in the absence of any such pleadings. Here in the instant case, it was no where pleaded in the written statement that the suit property was ancestral and coparcenary. Not only that, during the course of arguments, it is transpired that during the pendency of the suit, defendant had also attempted to amend his written statement for incorporating the aforesaid pleas to say that the land was ancestral and coparcenary, but the same was contested by the plaintiff and was dismissed vide order dated 9.3.2004

(Annexure R/4) and that order was never challenged by the defendant. In this view of the matter also, no benefit can be derived by the defendant from the observations made in **Ram Kanwar**'s case (supra).

Now adverting to the last point raised by learned counsel for the defendant, a perusal of the impugned judgments goes a long way to show that there is concurrent finding of the courts below that prior to the execution of the Will Ex. P1, Swaran Singh testator was in joint possession of the suit property with the defendant to the extent of 1/2 share. After his death, on the basis of the Will, which has been duly proved, plaintiff Daljiwan Kaur has stepped into shoes of the testator and become co-sharer to the extent of 1/2 share.

In the given facts and circumstances, a co-sharer is not required to seek the relief of possession while filing a suit for declaration on the basis of a Will which too pertains to the share of the testator.

In view of above discussion and variance of facts of this case from the facts in **Ram Saran** and **Sita Ram**'s cases (supra), again no benefit can be derived by the defendant from the observations made in the said rulings.

In view of my foregoing discussion, there is no merit in this appeal. No question of law, much less the substantial question of law, has been raised warranting admission of this appeal and as such, the same is hereby dismissed.

Before parting with this judgment, it is also pertinent to

mention here that defendant/appellant also moved an application under Order 41 Rule 27 in this appeal for adducing additional evidence. Since no merit was found in the appeal itself, therefore, no order is required to be passed on that application.

(Pritam Pal)
Judge

December 06, 2007
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